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No. 87-1295

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In The  
**Supreme Court of the United States**  
October Term 1987

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UNITED STATES OF AMERICA,  
*Petitioner*

v.

ANDREW SOKOLOW,  
*Respondent*

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**ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**RESPONDENT ANDREW SOKOLOW's  
BRIEF IN OPPOSITION**

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### **QUESTION PRESENTED**

Whether the conformance of an airline passenger to particular characteristics of the "drug courier profile" gave rise to a reasonable suspicion that the passenger was engaged in narcotics trafficking at the time that the passenger was stopped in an airport by drug enforcement agents.

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**STATEMENT**

Respondent Andrew Sokolow (Respondent) finds that the Petitioner's statement accurately sets forth the facts material to the consideration of the question presented.



## REASONS WHY THE CAUSE SHOULD NOT BE REVIEWED

The decision of the court of appeals in Respondent's case was the result of the court's straightforward application of firmly established precedent set by this Court to the facts before it on the well settled question of federal law regarding the reasonableness of an airport *Terry* stop for narcotics trafficking.

Recognizing and accepting that the "drug courier profile" is a useful tool to aid in the identification of drug traffickers, the court of appeals examined the elements of the drug courier profile relevant to Respondent's case. However, rather than blindly relying on the matching of Respondent's traits with the drug courier profile to find reasonable suspicion, the court of appeals looked carefully to the elements of the profile relevant to Respondent's case to determine whether or not those particular elements of the profile when considered collectively, established a reasonable suspicion, based upon specific and articulable facts, that Respondent, when stopped, was then engaged in narcotics trafficking.

Despite Respondent's conformance with a number of elements of the drug courier profile, the court of appeals concluded that the totality of the circumstances failed to establish a reasonable suspicion that Respondent was engaged in criminal activity at the time that he was stopped and that the Fourth Amendment was therefore violated. By closely examining the totality of the circumstances to determine whether the facts, taken together, raised a reasonable suspicion that justified an investigative stop, the decision reached by the court of appeals is entirely consistent with the four decisions of this Court on the identical question (*United States v. Mendenhall*, 446 U.S. 544 (1980); *Reid v. Georgia*, 448 U.S. 438 (1980); *Florida v. Royer*, 460 U.S. 491 (1983); *Florida v. Rodriguez*, 469 U.S. 1 (1984)) and is further consistent with decisions by other federal courts of appeals on the same

matter. Therefore, the decision of the court of appeals in Respondent's case provides no basis for review by this Court.

## i

In *Reid v. Georgia*, a federal drug enforcement agent stopped Reid in a public airport on the basis of the agent's belief that Reid matched the drug courier profile. While an examination of the facts showed that Reid's appearance and activity did conform to characteristics of the profile, this Court refused to find that satisfaction of the drug courier profile automatically created a reasonable suspicion that justified an investigative stop. Instead, this Court still required that its standard for investigatory detention be met, namely, that the detention be supported by a reasonable and articulable suspicion that the person seized is engaged in criminal activity.

Likewise, in Respondent's case, the court of appeals refused to find that the simple presence of factors matching the drug courier profile automatically created a reasonable suspicion that justified Respondent's stop.<sup>1</sup> Regardless of the presence of a "lengthy list of detailed observations" matching the drug courier profile, the court of appeals believed that "the courts are not relieved of their duty to review the list critically and decide whether each particular observation cited actually contributed something to the 'whole picture' — that is, whether the particular observation bears any reasonable correlation to a suspicion that the person presently is engaged in criminal activity." App. 8a-9a.

The court of appeals recognized that the drug courier profile serves as a useful investigative tool in the detection of drug traffickers at airports. Because the very nature of the profile is to aid in the identification of persons *presently*

<sup>1</sup>"Courts are not obliged to accept blindly any fact the police can muster when the government fails to establish any credible connection between the fact and a suspicion of ongoing (or recently completed) criminal activity. Nor is the phrase 'drug courier profile' a talismanic label that the government can apply to any given set of facts to obviate consideration of whether reasonable suspicion existed." App. 9a.

*carrying drugs*,<sup>2</sup> the court of appeals, in analyzing the propriety of detentions based upon elements of the profile, found it useful to distinguish those elements of the profile which are indicative of ongoing criminal activity from those elements which do not. The court believed that the profile elements of evasive action at the airport or the use of an alias during travel are elements which are indicative of ongoing criminal activity and that the presence of these elements may thus provide a sufficient basis for detention. Other elements of the profile — destination to and arrival from a “drug source” city, manner of attire, time of flight, presence of carry-on luggage and absence of checked luggage, or position among disembarking passengers — are all profile elements which the court believed describe a cross section of innocent travelers, but also serve to identify the stereotypical appearance or behavior of a drug courier. As such, the court found that the presence of these elements alone may provide a sufficient basis for the further investigation of the passenger to determine whether criminal activity may be afoot; without more, the presence of these elements alone would provide no basis for detention. This Court reached the same conclusion in *Reid*, finding that “circumstances [regarding early arrival from a drug source city and the presence of carry-on bags without checked luggage] describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation . . . could justify a seizure.” 448 U.S. at 441.

The methodology adopted by the court of appeals for analyzing airport detentions premised upon elements of the drug courier profile merely provides the court with a useful and orderly means towards arriving at a conclusion regarding the reasonableness of such detentions. While the methodology may involve the separate consideration and analysis of the

<sup>2</sup>This Court has defined the drug courier profile to be “an informally compiled abstract of characteristics thought typical of persons *carrying* illicit drugs.” *Mendenhall*, 446 U.S. at 547, n.1. (opinion of Stewart, J.) (emphasis provided).

profile elements relevant to the case in terms of whether the elements are indicative of ongoing criminal activity or whether they describe drug couriers in general, the underlying basis for concluding whether the detention was reasonable is still premised upon this Court’s standard formulation in detention cases. In Respondent’s case, the court of appeals made clear that regardless of whether the elements of the drug courier profile relevant to a particular case are elements descriptive of ongoing criminal activity or elements descriptive of drug couriers in general, any element or combination of elements relied upon by a law enforcement officer as an articulable fact giving rise to the officer’s belief of reasonable suspicion of criminal activity must be supported by a foundation for such belief. The court of appeals stated that the requisite foundation, or what the court chose to call “empirical documentation” or “statistical evidence,” is provided by the same type of evidence that this Court required in *Terry*, that is, evidence showing that the officer believed the conduct to be suspicious of criminal activity because of his experience or expertise in law enforcement and his own testimony “about his trained observation of criminal activity.” App. 13a, 14a. After such “empirical documentation” is established, the formulation adopted by the court of appeals requires a collective examination of the profile elements to determine the existence of a reasonable suspicion of ongoing criminal activity under the totality of the circumstances.

In adopting its methodology, the court of appeals sought to ensure that “some distinction between investigation and detention . . . remain.” App. 14a. The court recognized “that the mosaic that may cause a trained officer of the law to investigate further is not the same mosaic that creates reasonable suspicion to allow a Fourth Amendment seizure” and that “the surmises or hunches that may lead a trained investigator to continue investigation, however, do not serve to allow a seizure.” App. 14a.



At the time that drug task force agents stopped Respondent at the Honolulu airport on July 25, 1984, the agents knew that (1) Respondent had just returned from a three-day trip to Miami; (2) Respondent had been nervous when he purchased his airline tickets and had paid \$2100 cash for the tickets from a large roll of \$20 bills; (3) Respondent and his traveling companion carried four bags and neither had checked any luggage; (4) Respondent wore a black jumpsuit and a lot of gold jewelry; (5) during his return layover at the Los Angeles airport, Respondent appeared nervous and looked all around the waiting area; and (6) Respondent was ticketed under the name Andrew Kray, but had his voice on an answering machine at a telephone subscribed to by a Karl Herman.

The court of appeals appropriately found that the fact that Respondent's voice was on an answering machine for a telephone listed under the name of Karl Herman, who turned out to be Respondent's roommate, did not provide a basis for suspecting that Respondent was using an alias during his trip.

The court further found that the Los Angeles agent's testimony regarding Respondent's nervousness and looking all around the waiting area in the Los Angeles airport was not supported by any further evidence which showed that such nervousness was indicative of criminal activity. The court's conclusion is soundly supported by the fact that the record contains no testimony by the agents, nor any other evidence, which showed that in the experience and trained observation of the particular agents who observed Respondent, that his behavior at the Los Angeles airport gave rise to any belief by the agents that Respondent was engaged in behavior suspicious of criminal activity.<sup>3</sup> Such supporting evidence is precisely the type of "empirical documentation" which the

<sup>3</sup>The conclusion of the court of appeals is in accord with the view held by the Sixth Circuit court of appeals, which has specifically found that nervousness at airports is entirely consistent with innocent behavior and should be entitled to no weight

court of appeals requires in its reasonable suspicion formulation and is the same type of foundational evidence which this Court requires in all instances involving *Terry* detentions.

The lack of the requisite foundational evidence to support a finding that Respondent's behavior at the Los Angeles airport was indicative of ongoing criminal activity was critical to the finding of reasonable suspicion by the court of appeals. Without such evidence, the court was left to logically conclude that the facts present in Respondent's case provided no basis for a reasonable suspicion that Respondent was engaged in criminal activity at the time that he was stopped and that the facts presented only a "vague and inchoate profile" which best served as an investigative tool. App. 20a.

The decision of the court of appeals is in harmony with this Court's four decisions on drug-courier-profile stops. In *Mendenhall*, *Royer*, and *Rodriguez*, the presence of evidence of particular conduct indicative of criminal activity lead this Court to conclude in each case that there was a reasonable suspicion that the person detained was presently engaged in criminal activity. In *Mendenhall*, drug enforcement agents observed that Mendenhall had arrived in the early morning from a drug source city and was the last to deplane. Inside the terminal, she appeared to be very nervous, she completely scanned the entire gate area, walked very slowly toward the baggage area but claimed no baggage, then proceeded to make departure arrangements with a different airlines. Justice Powell's opinion specifically emphasized the fact that Mendenhall's conduct inside the terminal was supported with

in the reasonable suspicion analysis in drug courier profile cases. *United States v. Andrews*, 600 F.2d 563, 566 (6th Cir. 1979). See also *United States v. McCaleb*, 552 F.2d 717, 720 (6th Cir. 1977).

It should be noted that Petitioner supports its assertion that "numerous courts have treated nervousness as an important factor in determining the existence of reasonable suspicion" with authority wherein the nervous behavior was not observed prior to the stop, but instead was exhibited *after* the defendant was approached and questioned by drug enforcement agents. *United States v. Borys*, 766 F.2d 304, 311-12 (7th Cir. 1985); *United States v. Tolbert*, 692 F.2d 1041, 1047 (6th Cir. 1982). Petition for Writ of Certiorari at 14, n. 15.

detailed testimony by the observing agent that the agent's training and experience lead him to believe that Mendenhall's behavior was designed to evade detection. 446 U.S. at 564-565.

In *Royer* a drug enforcement agent at the Miami airport approached Royer for questioning upon observing Royer's appearance and mannerisms, his cash purchase of a one-way airline ticket and his mode of checking in his bags. The agent then discovered that Royer's airline ticket and luggage tag bore the name "Holt" while his driver's license carried his correct name. This Court concluded that evidence of the use of an assumed name provided a reasonable suspicion that Royer was engaged in criminal activity. The opinion by Justice White noted, however, that prior to the discovery that Royer was traveling under an assumed name, the factors observed by the agent provided a sufficient basis for investigating Royer, but did not provide a basis for detaining him on the reasonable suspicion that he was engaged in criminal activity. 460 U.S. at 502.

In *Rodriguez*, two plainclothes law enforcement agents observed three men behaving in an unusual manner at the Miami airport ticket counter. The men walked down the concourse carrying their luggage and the agents followed them. One by one, the men sighted the agents and spoke furtively to one another. The agents twice overheard one of the men to urge the other two to "get out of here." Rodriguez then unsuccessfully tried to run from the agents and when confronted, the men gave contradictory statements concerning the identities of two of them.

The court of appeals found that Respondent's case contained none of the factors present in *Mendenhall*, *Royer*, and *Rodriguez*, all of which involved some behavior by the persons detained which supported a reasonable suspicion that they each were engaged in criminal activity when stopped. In particular, the court of appeals aptly emphasized that even though the agents in Respondent's case discovered that Respondent's true name was Sokolow, but that his airline

ticket was issued under the name of Kray and that Respondent, like Royer, was traveling under an assumed name, the discovery of this fact occurred *after* the seizure of Respondent. The court reiterated that the fact that Respondent had his voice on another person's telephone answering machine led to an "unwarranted" belief by the agents prior to the physical seizure of Respondent that he was using an alias and therefore, the evidence obtained after the seizure that Respondent was in fact traveling under an assumed name "[could] not be used as a ground for bringing [Respondent's] case in line with *Royer*." App. 18a.

The court of appeals found that Respondent's case was more like *Reid* where the presence of drug courier profile factors provided, at best, a basis to further investigate, but not to detain. In *Reid*, drug agents observed Reid and another male walking through the airport concourse in a single line of passengers who had disembarked from a drug source city. The men carried similar shoulder bags. Reid was separated from his companion by several people and he occasionally looked backward to his companion. In the main lobby, the men claimed no luggage, they conversed briefly, then together began to depart from the terminal when they were stopped. This Court found that of the evidence relied upon for the stop, only Reid's behavior while walking down the concourse related to his particular conduct. Although the agent believed from this observation that Reid and his companion were attempting to conceal the fact that they were traveling together, this Court concluded that the agent's belief was one "that was more an 'inchoate and unparticularized suspicion or hunch' [quoting *Terry v. Ohio*], than a fair inference in the light of his experience," which was "simply too slender a reed to support the seizure [of the men]." 448 U.S. at 441.

Like *Reid*, the decision of the court of appeals in Respondent's case is further consistent with decisions of other federal courts of appeals which recognize that drug courier profiles, while a useful investigative tool, do not automatically create a reasonable suspicion that will justify an investigative



stop. See e.g. *United States v. Buenaventure-Ariza*, 615 F.2d 29 (2nd Cir. 1980); *United States v. Rico*, 594 F.2d 320 (2nd Cir. 1979); *United States v. Elmore*, 595 F.2d 1036 (5th Cir. 1979), cert. denied, 447 U.S. 910 (1980); *United States v. Ballard*, 573 F.2d 913 (5th Cir. 1978); *United States v. Saperstein*, 723 F.2d 1221 (6th Cir. 1983); *United States v. Andrews*, 600 F.2d 563 (6th Cir. 1979); *United States v. Smith*, 574 F.2d 882 (6th Cir. 1978); *United States v. Lewis*, 556 F.2d 385 (6th Cir. 1977), cert. denied, 435 U.S. 1011 (1978); *United States v. Craemer*, 555 F.2d 594 (6th Cir. 1977); *United States v. Pope*, 561 F.2d 663 (6th Cir. 1977); *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977).

### iii

Rather than "outlaw[ing] a large percentage of the 'reasonable suspicion' stops of suspected drug traffickers passing through the airports within the Ninth Circuit,"<sup>4</sup> the decision of the court of appeals in Respondent's case allows for the continued use of the drug courier profile in justifying reasonable suspicion. The decision merely reinforces the well established principles set forth by this Court and by other federal courts of appeals that any seizure of a person premised upon factors of the profile must be supported by a reasonable suspicion, based upon specific and articulable facts, that the person stopped is presently engaged in narcotics trafficking. As such, the decision of the court of appeals provides no basis for review by this Court.

<sup>4</sup>Petition for Writ of Certiorari at 11.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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